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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. [redacted] 154

IN THE MATTER OF
JOSEPH E. NAMOFF and JULIUS NAMOFF, etc.,
Alleged Bankrupt,

Petitioner,

vs.

HYLAND ELECTRICAL SUPPLY COMPANY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

	PAGE
Statutes and Rules Involved	1
Additional Statement of Facts	2
Summary of Argument	4
Argument	6
Conclusion	26
Appendix	27

AUTHORITIES.

Cases:

Abrams v. Astor, et al, 170 F. 2d 544, (CA 2, 1948) 16
Aetna Life Insurance Co. v. Kepler, 116 F. 2d 1, (CCA 8, 1941) 6
Allen, R. M., as Trustee v. R. A. Watkins, 234 F. 2d 925 (CA 5, 1956) 16
Barnes v. Barnes, 355 Mich. 458, 94 N.W. 2d 829 (1959) 21
Baumgartner v. United States, 322 U.S. 665 (1944) 17
Boyce v. Chemical Plastics, Inc., 175 F. 2d 839 (CA 8, 1949) 16
Brunson v. Burch, 79 F. Supp. 833 (1948, D.C., Cal.) 20
Comstock v. Institutional Investors, 335 U.S. 211 (1948) 11
Costello v. Fazio, 256 F. 2d 903 (1956, CCA 9) 17
District of Columbia v. Pace, 320 U.S. 698 (1944) 7, 8
Duval, In re, 103 F. 2d 653 (1939, CA 7) 13, 15
Eggleston v. Eggleston, 228 N.C. 668, 47 S.E. 2d 243 (1948) 24
Fergus Falls Woolen Mills Co., In re, 41 F. Supp. 355 (1941, D.C., Minn.) 11
Garden City Brewery, Inc., In re, 208 F. 2d 377 (1953, CA 7) 4, 13, 15

Garver & Opray, Inc., In re, 203 F. 2d 690, (CA 6, 1953) 16
Goldberg v. Goldberg, 276 App. Div. 1084, 95 N.Y.S. 2d 77 (1958) 24
Greenbay & Mississippi Canal Co. v. Patent Paper Co., 173 U.S. 179 (1899) 26
Haulk v. Fry, 167 Neb. 398, 93 N.W. 2d 183, (1958) 21
Heath, et al v. Helmick, 173 F. 2d 156 (CA 9, 1949) 16
Hedgeside Distillery, In re, 123 F. Supp. 933 (1952, D.C., Cal.) 11
Joseph v. Donover Co., 261 F. 2d 812 (CA 8, 1959) 21
Katz Underwear Co. v. United States, 127 F. 2d 965 (CCA 3, 1942) 6
Keen v. Jason, 19 Misc. 538, 187 N.Y.S. 2d 825, (1959) 21
Kelley, In re, 85 F. Supp. 316 (1949, D.C., Cal.) 11
Long Beach v. Kirk, 165 Cal. App. 2d 470, 332 P. 2d 131 (1959) 21
Mercer v. Vinson, 85 Ariz. 280, 336 P. 2d 854 (1959) 21
Morasco, In re, 233 F. 2d 11 (1956, CA 2) 17
Morby Construction Co. v. Maryland Casualty Co., 300 U.S. 185 (1939) 7
Morris Plan Industrial Bank v. Henderson, 131 F. 2d 975 (1942, CA 2) 13, 14
Nelson v. Seaboard Surety Co., 269 F. 2d 882 (CA 8, 1959) 23
N. L. R. B. v. Columbian Co., 306 U.S. 292 (1939) .. 8, 9
Peck v. Peck, 21 Ill. App. 2d 118, 157 N.E. 2d 279 (1959) 21
Pioch, In re, 235 F. 2d 903 (1956, CA 3) 17
Porterfield, C. B., In re, 249 F. 2d 634 (CA 5, 1957) 17
Pringle Engineering & Mfg. Co., In re, 164 F. 2d 299 (CA 7, 1947) 16
State Farm Mutual Auto. Ins. Co. v. Bonacci, 11 F. 2d 412 (CCA 8, 1940) 6
Topper, In re, 229 F. 2d 691 (CA 3, 1956) 17
Tyne, J. J., In The Matter of, 257 F. 2d 310 (1958, CA 7) 17

Vlahis v. De Weese, 216 Md. 384, 140 A. 2d 665 (1958) 21
Walling v. Plymouth Mfg. Co., 139 F. 2d 78 (CA 7, 1943) 21
Watson v. Watson, 231 Ind. 385, 108 N.E. 2d 893 (1952) 20, 21, 23
Wolf, In re, 165 F. 2d 707 (CA 3, 1947) 16
Wyman v. Davis, 223 So. C. 172, 74 S.E. 2d 694 (1953) 24

Miscellaneous:

Clark and Stone, Review of Findings of Fact, for U. Chi. L. Rev. 190 (1937) 7
4 Collier Bankruptcy, 2218 (14 Ed., 1942) 13
Stern Review of Findings of Administrators, Judges and Juries, A Comparative Analysis, 58 Harv. L.R. 70 (1944) 7, 8, 9

Statutes:

Ind. Acts, 1949, Ch. 114, p. 283 ..... 25, 28
10 Burns' Indiana Statutes, Pt. 1, 355 § 50-406 Partnership Defined 25, 28
10 Burns' Indiana Statutes, Pt. 1, 360 § 50-416 Partnership by Estopped 25, 28
General Order 47 ..... 12, 13, 15
Rule 52(a) Federal Rules of Civil Procedure 12, 27
Rule 86(a) Federal Rules of Civil Procedure 10, 14, 27
30 Stat. 545, July 1, 1898, c. 541, § 2, as Amended; 11 United States Code § 23(a) 24, 28
30 Stat. 547, July 1, 1898, c. 541, § 2; 11 United States Code § 11(10) 6, 29

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STATUTES INVOLVED.

Rule 52(a) Federal Rules of Civil Procedure. (Appendix infra p. 27).

Rule 86(a) Federal Rules of Civil Procedure. (Appendix infra p. 27).

30 Stat. 545, July 1, 1898, c. 541, § 2, as amended; 11 U.S.C., § 11(10). (Appendix infra p. 29).

30 Stat. 547, July 1, 1898, c. 541, § 2; 11 U.S.C., § 23(a). (Appendix infra p. 28).

Ind. Acts, 1949, Ch. 114, p. 318; 10 Burns' Ind. Stat. Pt. 1, 355, § 50-406, Partnership Defined. (Appendix infra p. 28).

Ind. Acts, 1949, Ch. 114, p. 318; 10 Burns' Ind. Stat. Pt. 1, 360, § 50-416, Partnership by Estoppel. (Appendix infra p. 28).

ADDITIONAL STATEMENT OF FACTS

Respondents believe Petitioner erroneously states the sequence of appeals from the order entered by the Referee.

After a hearing on the issue of the existence of a partnership, the Referee in Bankruptcy entered findings of fact and conclusions of law on November 17, 1957 (Pet. for Writ, Appendix 1-4).

Thereafter, Respondents filed a Petition for Review and Brief in Support thereof before the District Court within the time prescribed as extended (Petitioner's Appendix 25-37 continued in Respondents' Appendix 1-87).

Petitioner filed a Motion to Dismiss the Petition for Review (Petitioner's Appendix 38-39), which was overruled by the District Court on November 20, 1958 (Respondents' Appendix 88-89).

Subsequently, the District Court reversed the Referee in Bankruptcy, sustained Respondents' Petition for Re-

view and entered an order to that affect on June 18, 1959 (Petition for Writ Appendix 5-7; Petitioner's Appendix 90-92).

Petitioner appealed from that order to the Court of Appeals for the Seventh Circuit (Petitioner's Appendix 93). On that appeal he also alleged erroneous entry of two prior orders.

The Court of Appeals concluded it was without jurisdiction to entertain an appeal from the first two orders because the review Petitioner sought was tardy. Furthermore, it determined those orders were properly entered (Pet. for Writ, Appendix 10-12).

The Court also sustained the order of the District Court reversing the Referee which granted Respondents' Second Amended Petition on the question of the existence of a partnership. 275 F. 2d 14 (CA 7, 1960).

A petition for rehearing addressed to the Court of Appeals on March 4, 1960, was denied on March 22, 1960.

The Petition for Writ of Certiorari followed.

SUMMARY OF ARGUMENT.

I.

The District Court, in reversing the Referee, properly applied the "clearly erroneous" doctrine of review which is historically less restrictive than the "substantial evidence" rule. The existence of "some" evidence to sustain the Referee does not satisfy either rule of review as Petitioner contends. Therefore, Petitioner actually seeks only a third review of the evidence which this Court has and should deny.

II.

If the District Court's application of the "clearly erroneous" doctrine of General Order 47 was correct as Respondents contend, the Court of Appeals affirmance of that decision did not violate the identical "clearly erroneous" doctrine of Rule 52(a) of the Federal Rules of Civil Procedure which binds the latter Court. Neither is there a conflict between the Courts of Appeals for the Second and Seventh Circuits on the application of the "clearly erroneous" rule. The case of *In Re Duval*, 103 F. 2d 653 (1939, CA 7) was decided on the basis of General Order 47 before that Order was amended in 1939 but after promulgation of Rule 52(a) of the Federal Rules of Civil Procedure. The dichotomy created by the "presumption of correctness" test of the unamended General Order and the "clearly erroneous" doctrine of Rule 52(a) in the *Duval* case was nonexistent when the Second Circuit later decided the case of *Morris Plan Industrial Bank* v. *Henderson*, 131 F. 2d 975 (1942, CA 2). Subsequent Seventh Circuit decisions, including the case upon which Petitioner relies, *In Re Gar-*

den City Brewery, Inc., 208 F. 2d 377 (1953, CA 7), specifically adopt the *Morris Plan* rationale.

Even if the Court of Appeals applied the "substantial evidence" rule, which it did not, Petitioner was not prejudiced by a more restrictive review of the evidence than the "clearly erroneous" doctrine requires.

III.

The courts below relied upon decisions of the Supreme Court of Indiana on the applicable question of state law. Their reliance on the rule, with which courts of other jurisdictions concur, was not adverse to any other existing state rule.

IV.

The statutory directive requiring Respondents to prove a partnership in law and fact has not been violated by inference. Petitioner fails to properly interpret the distinction between proof of a partnership in law and fact and partnership by estoppel. The former may be established from conduct proving intent to form a contractual entity. The latter requires proof of representations upon which a third person relies in extending credit. No creditors knew of the documentary evidence taken from the files of the alleged bankrupts in the case at bar. Neither was there proof of reliance in extending credit based upon the existence or import of those documents. Contrariwise, the documents revealed Petitioner's legal intent to conduct business as a partnership with his brother. Therefore, this Court should not review Petitioner's misinterpretation of the opinions below.

ARGUMENT.

I.

THE DISTRICT COURT PROPERLY REVERSED THE REFEREE IN BANKRUPTCY.

Petitioner first asserts that the District Judge should not have reversed the Referee in Bankruptcy (Pet. for Writ 2, 5). The asserted error is predicated on the alleged existence of "some competent" evidence to sustain the Referee's findings (Pet. for Writ 5, 7). Such a contention misinterprets the District Court's scope of review.

The Bankruptcy Act specifically empowers the Court to

> "consider records, findings and orders certified to the Judges by Referees and confirm, modify, or reverse such findings and orders. * * *" 11 U.S.C. § 11(10).

That statutory authority has been narrowed by General Order 47 which directs the District Judge to "accept the findings of fact" of the Referee unless *clearly erroneous*.

The words *clearly erroneous* describe the District Court's reviewing power. That doctrine is also embodied in Rule 52(a) of the Federal Rules of Civil Procedure. Both the General Order and Rule were promulgated by this Court.

The rule has its roots in equity practice.

> *Katz Underwear Co.* v. *United States*, 127 F. 2d 965 (CCA 3, 1942);
>
> *Aetna Life Insurance Co.* v. *Kepler*, 116 F. 2d 1, 4-5 (CCA 8, 1941);
>
> *State Farm Mutual Auto Ins. Co.* v. *Bonacci*, 11 F. 2d 412 (CCA 8, 1940).

Before 1912 oral testimony was neither admissible nor admitted in equity trials.

District of Columbia v. *Pace*, 320 U.S. 698, 701 (1944);

Morby Construction Co. v. *Maryland Casualty Co.*, 300 U.S. 185, 191 (1939).

Evidence was limited to written depositions and interrogatories.

Clark and Stone, *Review of Findings of Fact*, for U. Chi. L. Rev. 190, 204 (1937).

Consequently, equity appeals were *de novo* because the reviewing Court was in at least an equal, if not superior, position to judge the evidence.

Stern, *Review of Findings of Administrators, Judges and Juries, A Comparative Analysis*, 58 Harv. L. R. 70, 79 (1944).

In 1912 the Federal Equity Rules were adopted. Thereafter, oral testimony was permissible.

Federal Equity Rule 46.

Logic then demanded abandonment of *de novo* appeals because the credibility of witnesses became an additional issue. As a result, Appellate tribunals lost testimonial equality because review was confined to the "cold print" of the record. Reason required that great weight attach to the trial Court findings of fact. Thereafter, equity appellate decisions proclaimed that the findings of fact would be subsequently accepted unless "clearly erroneous".

Stern, *Review of Findings of Administrators, Judges and Juries, A Comparative Analysis*, 58 Harv. L. R. 70, 79 (1944).

See also cases cited in official note to Rule 52, Federal Rules of Civil Procedure.

However, equity did not abandon the power of the reviewing Court to weigh the evidence.

District of Columbia v. *Pace*, 320 U.S. 698, 702 (1944).

In other words, the withdrawal from *de novo* appeals required by the introduction of oral testimony was not a retreat to the confinement of the "substantial evidence" rule.

The "substantial evidence" rule, historically applicable in appeals at law, requires acceptance of the verdict if there is "substantial evidence" to support it.

Stern, *Review of Findings of Administrators, Judges and Juries, A Comparative Analysis*, 58 Harv. L. R. 70, 73 (1944).

The existence of *SOME* evidence, as Petitioner contends, does not meet the prescribed test.

N. L. R. B. v. *Columbian Co.*, 306 U.S. 292, 300 (1939).

The "substantial evidence" rule has been applied to reviewable fact findings by both judges and juries in cases at law and administrative agencies.

The logic in the application of the rule to jury decisions is because the findings are made by persons embodying the underlying sense of fairness of the community. And, the same rule has been applied to judicial decisions in the absence of a jury only because the action was at law. To secure the advantage of specialization, the doctrine also has been applied to administrative agency determinations.

Stern, *Review of Findings of Administrators, Judges and Juries, A Comparative Analysis*, 58 Harv. L. R. 70, 81, (1944).

In short, the "substantial evidence" rule prohibits reversal of findings of fact contrary to the weight of the evidence if supported by sufficient evidence for a reasonable man to concur with the conclusion reached.

> *N. L. R. B.* v. *Columbian Co.*, 306 U.S. 292, 300 (1939).

The *clearly erroneous* doctrine, however, would permit such a reversal.

> "To what extent does this 'clearly erroneous' test differ from the 'substantial evidence' rule? In giving effect to the latter, courts determine not merely whether there is 'some' evidence to support a finding, but whether there is enough from which a reasonable man could draw the conclusion reached. If the court believed that a reasonable man could reach the conclusion, could it hold the conclusion 'clearly erroneous' Theoretically, at least, it could; 'I agree that a reasonable man could make such a finding, but I think it 'clearly wrong.' "
>
> Stern, *Review of Findings of Administrators, Judges and Juries, A Comparative Analysis*, 58 Harv. L. R. 70, 80, 81 (1944).

That the "clearly erroneous" doctrine is less restrictive than the "substantial evidence" rule was acknowledged at the time the Federal Rules of Civil Procedure were adopted. Former Attorney General William D. Mitchell, Chairman of the Advisory Committee, appointed by the Supreme Court of the United States to draft the rules, said:

> "The committee chose the broader view so that the rule now applying to all cases without a jury (including actions at law) is practically the modern equity rule. It is not the ancient rule that allowed a trial '*de novo*' on the facts in the Appellate Court * * * it is a limited provision * * * the Appellate Court may not set aside the findings unless they are 'clearly

erroneous' or against the CLEAR WEIGHT of the evidence." Proceedings of the Institute on Federal Rules (Cleveland, Ohio), (American Bar Association, 1938) 318. (Emphasis supplied).

The Federal Rules of Civil Procedure, including Rule 52(a) became effective in 1938.

Rule 86(a), Federal Rules of Civil Procedure.

Thereafter, the identical language was incorporated in General Order 47 which became effective February 13, 1939.

Therefore, Petitioner's allegation of error in the District Court order reversing the Referee because of the alleged existence of SOME competent evidence is legally, historically and logically unfounded. The presence of some evidence would not support the Referee's decision under the "substantial evidence" rule, and certainly it would not satisfy the less restrictive "clearly erroneous" doctrine.

The applicable test concerns the sufficiency, quantum or weight of the evidence. The District Court, with greater experience, found that weight demanded reversal of the Referee. In so doing he denominated each contested finding of fact and all the conclusions of law "clearly erroneous." (Petitioner's Appendix 90-92).

The record supports the District Court's proper application of his restricted power of review. Respondents' evidence consisted primarily of documents obtained from the files of the alleged bankrupts. (Respondents' Appendix 99-151). These documents marked a course of conduct consistent only with an intent of Petitioner to form a partnership with his brother.

Petitioner's testimony denied the efficacy of the documents and orally contradicted their import. (Pet. for Writ 5, 6). The Judge disregarded those explanations and denials made at a time when Petitioner faced substantial liability. He determined Petitioner's prior conduct contradicted and outweighed his testimony.

That determination by the District Judge and the attendent reversal was a valid application of the test prescribed by General Order 47.

The determination was further aided by the Court's unquestioned right to independently interpret the documentary evidence as a matter of law.

> *In Re Kelley*, 85 F. Supp. 316 (1949, D.C., Cal.);
> *In Re Hedgeside Distillery*, 123 F. Supp. 933, 942 (1952, D.C., Cal.);
> *In Re Fergus Falls Woolen Mills Co.*, 41 F. Supp. 355, 360 (1941, D.C., Minn.).

And further the Judge was unhampered by "cold print" of the record because Petitioner's oral denials and explanations were largely uncontradicted except by documentary evidence. As a result, the issue of credibility was effectively removed.

Therefore Respondents contend Petitioner's first assertion is groundless, legally and factually. It quarrels with the District Court's determination with which the Court of Appeals concurred. Two Courts have decided adversely to Petitioner. Customarily, this Court has not and should not in the instant case permit a third review of fact questions.

> *Comstock* v. *Institutional Investors*, 335 U.S. 211, 214 (1948) and the fifteen cases therein cited.

II.

THE COURT OF APPEALS DID NOT EXCEED ITS SCOPE OF REVIEW NOR IS THERE A CONFLICT IN THE CIRCUITS AS TO THE EXTENT OF THAT POWER.

Petitioner secondly contends that the Court of Appeals erroneously sustained the order of the District Court reversing the Referee. Two grounds allegedly support that contention: first, that the Court of Appeals exceeded its scope of review; and second, that the Courts of Appeal are in conflict on the extent of that power (Pet. for Writ 2, 4).

General Order 47 is directed to District Courts.

> "Unless otherwise directed in the order of reference, the report of a Referee or of a special master shall set forth his findings of fact and conclusions of law, and the Judge shall accept his findings of fact unless clearly erroneous." General Order 47.

It enunciates the "clearly erroneous" doctrine of review. The meaning of the doctrine has heretofore been discussed.

Customarily, Rule 52(a) of the Federal Rules of Civil Procedure governs the scope of review of Courts of Appeal. That rule also incorporates the "clearly erroneous" doctrine.

> "Findings of fact shall not be set aside unless clearly erroneous * * *"
>
> Rule 52(a) Federal Rules of Civil Procedure.

Therefore, the District Court and the Court of Appeals have the identical scope of review. Respondents have hereinabove contended the District Court committed no error when it reversed the Referee. If the District Court did not err, it follows logically that the Court of Appeals properly sustained the District Judge (See above pages 6-11).

Neither are the opinions of the Courts of Appeal interpreting General Order 47 and Rule 52(a) of the Federal Rules of Civil Procedure in conflict on the application of that doctrine of review.

Petitioners allege there is a conflict in the following cases:

In Re Dayal, 103 F. 2d 653 (1939, CA7);
In Re Garden City Brewery, Inc., 208 F. 2d 377 (1953, CA7), and
Morris Plan Industrial Bank v. *Henderson*, 131 F. 2d 975 (1942, CA2).

The original General Order 47 was issued pursuant to Section 30 of the 1898 Bankruptcy Act. It read as follows:

"The reports of Referees in all proceedings under the Act and of special masters in proceedings under Section 77 and Section 77B of the Act, shall be deemed presumptively correct but shall be subject to review by the court, and the court may adopt the same or may modify or reject the same, in whole or in part, when the court is fully satisfied that error has been committed."

4 Collier, *Bankruptcy*, 2218 (14 Ed. 1942).

That language was amended by order of this Court effective February 13, 1939. The amendment substituted the "clearly erroneous" rule for the presumption of correctness previously accorded the Referee's findings.

The opinion in the *Dayal* case was announced April 28, 1939.

The *Dayal* decision interpreted the prior General Order because the General Order amendment was not in effect when the District Court reviewed the Referee's findings in that case.

However, the Federal Rules of Civil Procedure took

effect in the fall of 1938.

Rule 86(a) Federal Rules of Civil Procedure.

That rule specifically bound the Federal Courts to application of the Federal Rules in pending cases.

Therefore, the Court of Appeals for the Seventh Circuit was bound by Rule 52(a) in the *Duval* case, but the District Court had applied the unamended General Order 47. This distinction was recognized by the Second Circuit in the case upon which petitioner relies.

Morris Plan Industrial Bank v. *Henderson*, 131 F. 2d 975, 976 (1942, CA2).

Because the rules of review were not identical, the Court of Appeals for the Seventh Circuit, temporarily, properly applied Rule 52(a). In so doing, it held in part as follows:

> "We do not think that it can be held that the District Court is bound by the substantial evidence rule with regard to the findings made by the Referee. While the rule makes the Referee's findings presumptively correct, yet, the Court is vested with authority to reject the same, in whole or in part, when the court, in the exercise of its judgment, is fully satisfied that error has been committed. That language cannot, in our judgment, be the equivalent of the 'substantial evidence' rule. Of course, the judgment exercised by the Court must not be arbitrary, but when there are facts and circumstances concerning which reasonable minds might differ, we think the Court, after indulging in the presumption which the rule accords the Referee's report, may exercise its judgment even though it may be contrary to the finding as made by the Referee, and when the Court's judgment has been thus exercised, *we do not think we are at liberty to disturb the same except where we might conclude there was no substantial evidence or theory which would justify the Court in reaching*

a conclusion contrary to that of the Referee". (Emphasis supplied).

In Re Duval, 103 F. 2d 653, 656 (1939, CA7)

The Court thus recognized the then existing dichotomy between Rule 52(a) and General Order 47.

Subsequently, the amended General Order 47 became effective. The decision in the *Morris Plan* case followed.

That opinion interpreted the General Order and the rule in concert. Consequently, the Court of Appeals for the Second Circuit held the question presented to it was identical with that presented to the District Court.

Thereafter, for a short time, the Seventh Circuit continued to apply the dichotomy of the *Duval* case rationale, perhaps, erroneously. However, one case upon which Petitioner relies specifically adopts the *Morris Plan* rule in the following words:

> "Nothing contained in this record warrants departure from our holding in the case *In Re Skrentny*, 199 F. 2d 488, 492, wherein we said, 'General Order 47 is binding not only on the Court of Appeals but also on the District Judge sitting in bankruptcy.' The findings of the Referee should be accepted by the District Court except in plain cases. *Epstein* v. *Steinfeld*, 210 F. 236-237, *In Re Wolf*, 165, F. 2d 707, 710. In the case at bar, we have pointed out generally the testimony and evidence presented to the Referee. We find no good reason for refusing to accept his findings of fact. They appear to us to be supported by substantial evidence. CF *Morris Plan Bank* v. *Henderson*, 2 cir., 131 F. 2d 970."
>
> *In Re Garden City Brewery, Inc.*, 208 F. 2d 377 (1953, CCA 7).

Therefore, the opinions of the Seventh Circuit are now in accord with the leading case in the Second Circuit.

This conclusion is based upon Petitioners own cited authority.

Petitioner further erroneously contends that the Court of Appeals decided the instant case on the authority of the *Duval* and *Garden City* cases. The opinion of the Court observed that Respondents' herein contended a more liberal rule of review applied in the Seventh Circuit (Pet. for Writ Appendix 12). However, it cited no cases to support its own application of the "clearly erroneous" doctrine (Pet. for Writ Appendix 13).

What may appear to Petitioner and could have appeared to the Court of Appeals as contrariety in the opinions of other Circuits may be attributable to the questions presented. Illustratively, all of the Courts of Appeal uniformly hold that if the Referee and the District Judge concur, an even more stringent rule of review applies analogous to the "Two Court rule of this Court." Decisions in such cases hold that only a "clear mistake", "unsupported conclusion", "plain case" will result in reversal of that concurrence.

Heath, et al v. *Helmick*, 173 F. 2d 156, 161 (CA 9, 1949);

In Re Pringle Engineering & Mfg. Co., 164 F. 2d 299, 303 (CA 7, 1947);

In Re Garver & Opray, Inc., 203 F. 2d 690, (CA 6, 1953);

Bonce v. *Chemical Plastics, Inc.*, 175 F. 2d 839, 841 (CA 8, 1949);

Abrams v. *Astor, et al*, 170 F. 2d 544, 545 (CA 2, 1948);

In R. Wolf, 165 F. 2d 707, 709 (CA 3, 1947);

R. M. Aden, as Trustee v. *R. A. Watkins*, 234 F. 2d, 925, 928 (CA 5, 1956).

However, where, as in the instant case, the District Court has reversed the Referee, two approaches appear. All opinions either sustain or reverse the District Court as a result of an independent review of the evidence. In so doing, some cases merely apply the clearly erroneous doctrine to the facts as reviewed.

In Re J. J. Tyne, 257 F. 2d 310, 312, (CA 7, 1958);
In Re C. B. Porterfield, 249 F. 2d 634, 636, (CA 5, 1957).

Others observe the language of General Order 47 which does not restrict the Judge's statutory authority to reverse conclusions of law or the finding of ultimate facts or mixed questions of law and fact.

Costello v. *Fazio*, 256 F. 2d 903, 908, (1956, CCA 9);
In Re Pioch, 235 F. 2d 903, 905 (1956, CA 3);
In Re Topper, 229 F. 2d 691, 692, 693, (1956, CA 3);
In Re Morasco, 233 F. 2d 11, 15, (1956, CA 2).

That a reviewing tribunal may make unrestricted and independent findings of ultimate fact as a matter of law has been approved by this Court.

> "The consequence of a 'finding of fact' depends on the nature of the materials on which the finding is based * * * finding so called ultimate 'facts' more clearly implies the application of standards of law * * * Though labeled 'finding of fact', it may involve the very basis on which the judgment of fallible evidence is to be made. Thus, the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of 'fact' that precludes consideration by this Court."
> *Baumgartner* v. *United States*, 322 U.S. 665, 670-671 (1944).

The Court of Appeals reviewed the evidence in the instant case.

> "We have made a careful study of the testimony and have no hesitancy in stating that if we were the triers of the facts, we would, as the District Court did, reach a conclusion different from that of the Referee." (Petition for Writ Appendix 13).

The Court then, correctly applied the "clearly erroneous" doctrine.

> "Even with the serious limitation which General Order 47 places upon the authority of a District Court to set aside an order of a Referee, we still think the District Court reached the correct result." (Pet. for Writ Appendix 13).

Furthermore, the Court of Appeals also, secondarily, stated that the General Order restriction did not apply to conclusions of law or of ultimate fact.

> "It must be kept in mind that General Order 47 is directed in the findings of the Referee and not in the conclusions drawn therefrom. It is apparent that the Referee, erroneously we think, treated the issue of partnership as one of fact. In our judgment it is a conclusion or at any rate an ultimate fact to be deduced from those which are evidentiary." (Pet. fo. Writ Appendix 13).

That portion of the opinion was particularly appropriate to the facts in the instant case. The basic difference between the opinions of the Referee and the District Court concerned proof of partnership existence. The Referee examined some isolated tests of that existence and found adversely to Respondents. Respondents contended before the Referee, the District Judge and the Court of Appeals that the evidence when viewed as a whole, established partnership existence. Additionally, Respondents objected to the introduction of opinion evidence by third persons con-

cerning whether they dealt with the Petitioner as a partner. The Referee admitted that testimony. The Court of Appeals properly rejected it.

> "That the Referee treated the issue of partnership as one of fact (as opposed to ultimate fact) is further emphasized by the admission, over objection, of a line of testimony which permitted lay witnesses to express their opinion on that issue * * * it is reasonable to think that the Referee attached weight to this line of improper evidence, and it is equally reasonable to think that the District Court, as it had a right to do, discarded it." (Pet. for Writ Appendix 14).

Furthermore, the findings of fact of the Referee failed to find any evidence in the record to substantiate Respondents' allegations of partnership existence. (Petitioner's Appendix 26-27). To so find required the Referee to ignore the entire course of conduct recognized by the District Judge and the Court of Appeals as constituting a partnership in law. (Petitioner's Appendix 90-92; Petition for Writ Appendix 14-16).

Therefore, the District Court and the Court of Appeals properly corrected the newly appointed Referee's legally mistaken interpretation of the issue before him. Both Courts did so in accordance with the *clearly erroneous* doctrine as enunciated by General Order 47 and Rule 52(a) of the Federal Rules of Civil Procedure.

Even if the Court of Appeals had applied the "substantial evidence" rule, which it did not, Petitioner would not have been prejudiced because that rule is more restrictive than the "clearly erroneous" doctrine.

Therefore, Respondents contend the Court of Appeals did not abuse its scope of review, nor are the Circuits in conflict as to the extent of that power. In truth, Petitioner seeks a third review of the facts which this Court should deny.

III.

THE FEDERAL COURTS HAVE NOT DECIDED AN IMPORTANT QUESTION ON THE LAW OF PARTNERSHIP ADVERSELY TO APPLICABLE STATE LAW.

Petitioner thirdly complains the decisions of the District Court and the Court of Appeals conflict with applicable state law. (Pet. for Writ 4).

Respondents concede the applicable partnership law is state law.

> *In Re Brunson* v. *Burch*, 79 F. Supp. 833, 834 (1948, D.C. Cal.).

Burns' Indiana Statutes § 50-401, et. seq., codifying the Uniform Partnership Act is the Indiana state law. However, that statute is not set forth in the Petition for Writ in contravention of Rule 40(c) of the Rules of the Supreme Court of the United States.

Respondents further acknowledge that partnership is a contractual relationship as announced in the case Petitioner cites.

> *Watson* v. *Watson*, 231 Ind. 385, 108 N.E. 2d 893, 895 (1952).

The statutes prescribe only some, but not all of the tests, for determining partnership existence. Because the formation of a partnership is contractual, the intention of the parties to form such an entity is perhaps the most important single test. The cases interpreting the Uniform Partnership Act, including even the case Petitioner cites, so hold.

> "It is the substance and not the name of the arrangement between them which determines their legal relation towards each other, and if, from a consideration of all the facts and circumstances it appears that the parties intend, between themselves, that there

should be a community of interest of both property and profits of a common business venture, the law treats it as their intention to become partners."

Watson v. *Watson*, 231 Ind. 385, 108 N.E. 2d 893, 895 (1952).

Accord:

Mercer v. *Vinson*, 85 Ariz. 280, 336 P. 2d 854 (1959);

Long Beach v. *Kirk*, 165 Cal. App. 2d 470, 332 P. 2d 131 (1959);

Peck v. *Peck*, 21 Ill. App. 2d 118, 157 N.E. 2d 279 (1959);

Barnes v. *Barnes*, 355 Mich. 458, 94 N.W. 2d 829 (1959).

That intent may be proved by the conduct of the parties.

Keen v. *Jason*, 19 N.Y. Misc. 538, 187 N.Y.S. 2d 825 (1959);

Walling v. *Plymouth Mfg. Co.*, 139 F. 2d 78 (CA 7, (1943);

Joseph v. *Donover Co.*, 261 F. 2d 812 (CA 8, 1959);

Haulk v. *Fry*, 167 Neb. 398, 193 N.W. 2d 183, (1958);

Vlamis v. *De Weese*, 216 Md. 384, 140 A. 2d 665 (1958).

The District Judge in his memorandum of opinion set forth the conduct indicating Petitioner's intent (Petitioner's Appendix 90-92).

The Court of Appeals did likewise.

"It would unduly burden this opinion to give more than a brief summary of the evidence heard by the referee. It is pertinent to note that much of it was documentary, which the district court was in as good a position as the referee to evaluate. For instance, the

two businesses in question each maintained an account in the Mercantile National Bank and later in the Calumet National Bank. These accounts for both businesses were obtained in each bank pursuant to a partnership authority. These authorities were substantially in the same form. That given to the Calumet National Bank reads, "The undersigned desire to establish with you a demand deposit and checking account to be known as Chicago Wholesale Distributors, and the undersigned hereby certify that the said name is a partnership trade name used in the conduct of an unincorporated business, owned entirely by the undersigned as co-partners." This authority further states, "We have agreed that checks and orders for the payment of money withdrawing funds from said amount may be signed in the name of the partnership by any one (1) of the following named persons: Joseph Namoff, Ida Namoff (wife of Joseph), Julius Namoff." Each of these parties signed the authority as a partner in Chicago Wholesale Distributors. The similar authority given to the Mercantile National Bank provided that only two persons were permitted to draw on said account, namely, Julius Namoff, Jr. and Ida Namoff. In this connection, it is significant that while Joseph claimed to be the sole proprietor of the businesses he was not permitted to draw checks on the account maintained in the Mercantile National Bank. On the other hand, Julius, who denies he was a partner, was one of the two persons authorized to draw on this account. On at least two occasions money was borrowed from the banks on notes signed by Julius, Ida and Joseph, and deposited in the accounts of the businesses. Payments of these bank loans were made by checks on which Julius was a co-signer, on the accounts of the businesses.

During the relevant period there were in force and effect at least four insurance policies covering the named businesses. These policies were purchased and issued in the names of Joseph E. Namoff and Julius Namoff, doing business as Junior's Country Fair and

Chicago Wholesale Distributors. Another policy was issued in the name of Julius Namoff, naming Julius as assured, d b a Junior's Country Fair, located at 7046 Kennedy Avenue, Hammond, Indiana. At least six other policies listed Julius d b a Junior's Country Fair. All of these policies were paid for out of the accounts of the alleged partnership business. Julius was insured under a Blue Cross Hospitalization policy purchased and paid for by the businesses. An invoice for merchandise, addressed to Julius, was paid by check signed by Julius and drawn on the account of Chicago Wholesale Distributors. The original deposit required to obtain electrical service for the said businesses was paid by Julius. A store license was purchased by Julius for Junior's Country Fair. Throughout the conduct of these businesses trucks were used which were owned by Julius and registered in his name. Checks for car expense were drawn on these business accounts, payable to Julius. Receipt forms were used which listed a business admittedly owned by Julius individually and one of the businesses in question. Julius carried an Illinois Bell Telephone credit card issued and paid for by the named businesses."

Both Courts applied those facts to the law announced in an Indiana Supreme Court case.

> "It may be stated that when parties agree to do that which at law constitutes or creates a partnership, it is not material that the parties declare it shall not be such an association. While the intent of the parties is material, it is not the intent to do or to accomplish certain given things as such things are construed in the law."

That doctrine was subsequently adopted in *Watson* v. *Watson*, 231 Ind. 385, 108 N.E. 2d 893, 895 (1952), and by many other cases in every jurisdiction of which the following are representative:

> *Nelson* v. *Seaboard Surety Co.*, 269 F. 2d 882 (CA 8, 1959);

Wyman v. *Davis*, 223 So. C. 172, 74 S.E. 2d 694 (1953);

Eggleston v. *Eggleston*, 228 N.C. 668, 47 S.E. 2d 243 (1958);

Goldberg v. *Goldberg*, 95 N.Y.S. 2d 77, 276 App. Div. 1084 (1958).

Furthermore, Petitioner has failed to point out any general importance attachable to the rule properly applied by the courts below. Respondents submit there is none.

Therefore, Respondents contend Petitioner's third complaint unfounded seeks only another review of the factual issues presented which should be denied by this Court.

IV.

THE COURT OF APPEALS DID NOT ALTER THE STATUTORY DIRECTIVE REQUIRING PROOF OF PARTNERSHIP IN LAW IN BANKRUPTCY CASES.

Finally, Petitioner complains the opinion below alters the statutory directive requiring proof of a partnership in law and fact in bankruptcy cases.

11 U.S.C., Section 23(a).

He contends documentary evidence of conduct consistent with partnership intent establishes only a partnership by estoppel. (Pet. for Writ, 9)

Petitioner, however, fails to distinguish between conduct evidencing legal intent to establish a contractual relationship from conduct upon which a third person might have relied in extending credit.

According to the applicable Indiana law, the two types of partnership liability are defined as follows:

> "A partnership is an association of two or more persons to carry on as co-owners a business for profit."

Ind. Acts, 1949, Ch. 114, p. 283;
10 Burns' Ind. Statutes, Pt. 1, 355, §50-406, Partnership Defined.

"When a person, by word spoken or written, or by conduct represents himself, or consents to another representing him to anyone as a partner in an existing partnership, or with one (1) or more persons not actual partners as liable to any such persons to whom such representation has been made, who has on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner as liable to such person, whether the representation has, or has not been made, or communicated to such person so giving credit by or with the knowledge of the apparent partnership making the representation, or consenting to its being made."

Ind. Acts, 1949, Ch. 114, p. 283;
10 Burns' Ind. Statutes, Pt. 1, 360, §50-416, Partnership by Estoppel.

In the instant case, Respondents proof was of the conduct of Petitioner and his brother *inter sesse*.

This conduct established a legal intent to be partners, irrespective of the actual intent of the participants. . .

Only one witness testified that Petitioner represented himself as a partner. (Respondents' Appendix 96). Respondents remaining evidence consisted of documents from the files of the alleged bankrupts. Respondents introduced no testimony that any person knew of or extended credit in reliance upon the insurance policies, bank declarations of partnership, Blue Cross insurance coverage, business forms, advertising materials, payment of the utility deposit, bank loans, or store license purchase.

The Court of Appeals was thoroughly briefed on this question. It held:

"We think it plain that the acts and conduct of Julius and Joseph Namoff relative to the named Businesses, were such as to make the partnership as a matter of law." (Pet. for Writ, Appendix 14)

Respondents contend Petitioner misapprehends the import of that language of the Court of Appeals. It is not a ground for a rehearing in this Court to correct a construction based upon such a misapprehension.

Greenbay & Mississippi Canal Co. v. *Patent Paper Co.*, 173 U.S. 179, 180 (1899).

CONCLUSION.

Respondents pray the petition be denied with such sanctions and costs as this Court shall determine.

Petitioner has sought no more than a third review of the facts. Two competent tribunals have previously rejected his misapprehension of the case at bar.

No matter how tragic the facts and the resultant liability may be to the Petitioner, his petition fails to disclose error of sufficient import to challenge the imagination of this Court.

On the grounds set forth in this Brief in Opposition, this cause should rest undisturbed.

Respectfully submitted,

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APPENDIX.

Rule 52(a) Federal Rules of Civil Procedure.

In all actions tried upon the facts without a jury or with an advisory jury the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court accepts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Rule 86(a) Federal Rules of Civil Procedure.

These rules will take effect on the day which is three months subsequent to the adjournment of the second regular session of the 75th Congress, but if that day is prior to September 1, 1938, then these rules will take effect on September 1, 1938. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent

that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

Ind. Acts. 1949, Ch. 114, p. 283; 10 Burns' Indiana Statutes, Pt. 1, 355; § 50-406 Partnership Defined.

(1) A partnership is an association of two or more persons to carry on as co-owners a business for profit.

Ind. Acts. 1949, Ch. 114, p. 283; 10 Burns' Indiana Statutes, Pt. 1, 360; § 50-416 Partner by Estoppel.

(1) When a person, by words spoken or written, or by conduct, represents himself, or consents to another representing him to anyone, as a partner in an existing partnership or with one (1) or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

30 Stat. 547, July 1, 1898, c. 541, § 5; U.S.C., 11, § 23(a).

Same Partners. (a) A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

(Appendix)

30 Stat. 545, July 1, 1898, c. 541, §2 as amended; U.S.C., 11, § 10.

The courts of bankruptcy as defined in the previous chapter, viz., the district courts of the United States in the several States, the Supreme Court of the District of Columbia, and the United States courts in the District of Alaska, Hawaii, and Puerto Rico, are made courts of bankruptcy, and are invested, within their respective territorial limits as established on July 1, 1898, or as they may be thereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they were on July 1, 1898, or may be thereafter held, to • • • (10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; • • •